

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

August 28, 1997

UNITED STATES OF AMERICA,)	
Complainant)	
)	8 U.S.C. 1324b Proceeding
vs.)	
)	OCAHO Case No. 96B00058
ACOSTA, INC.,)	
D/B/A McDONALD'S,)	
Respondent)	

DECISION AND ORDER

Appearances: Carol J. Mackela, Esquire, Washington, D.C., for complainant;
Ruben Montemayor, Esquire, San Antonio, Texas, for respondent.

Before: Administrative Law Judge McGuire

Background

At issue is the charge of this Department's Office of Special Counsel (OSC or complainant) that during the period January 24-29, 1996, Acosta, Inc., d/b/a McDonald's (Acosta or respondent) violated the document abuse provisions of the Immigration Reform and Control Act of 1986 (IRCA), as amended, in the course of its employment contacts with Ms. Lourdes Gonzalez Lopez (Ms. Lopez).

On June 6, 1996, OSC filed a complaint with this Office alleging that Acosta had violated the document abuse provisions of IRCA, 8 U.S.C. § 1324b. Specifically, OSC charged that Acosta had refused to honor valid identity and employment eligibility documents that reasonably appeared genuine which Ms. Lopez, a permanent resident alien, had furnished to Acosta in the course of her having sought employment at one of its McDonald's restaurants, that Acosta requested that she produce additional and/or different documents than those required to have been provided to the respondent firm, and that Acosta had refused to hire her because Ms. Lopez had been unable to comply with that improper request.

The relief sought by OSC consists of Acosta's being ordered to cease and desist from the alleged discriminatory practice of document abuse, that Acosta be ordered to pay a civil penalty of \$1,000 for that proscribed activity, that Acosta be ordered to educate its personnel concerning

their responsibilities under 8 U.S.C. § 1324b and to post notices to its employees concerning their rights under those provisions of IRCA, that Ms. Lopez be awarded back pay, with interest, as well as having retroactive employee benefits and seniority restored, and such additional relief as deemed appropriate.

The matter was heard before the undersigned on December 11, 1996 in San Antonio, Texas.

Summary of Evidence

OSC's evidence consisted of the testimony of the charging party, Ms. Lopez, that of her mother, Gloria Lopez (Mrs. Lopez), and Cristobel Saucedo (Mr. Saucedo), a District Adjudications Officer in the San Antonio, Texas Regional Office of the Immigration & Naturalization Service (INS), as well as that of two rebuttal witnesses, Messrs. Guillermo Hernandez and Eduardo Valerio, together with the information contained in the 11 documentary exhibits marked and entered into evidence as Complainant's Exhibits 1 through 11.

Respondent's evidence was comprised of the testimony of Richard Acosta (Mr. Acosta), the owner/franchisee of the respondent McDonald's restaurant, that of his wife, Celia Acosta (Mrs. Acosta), and their employee, Guadalupe Marie Montez (Ms. Montez), and James Raymond Dudley (Mr. Dudley), the Employer Relations Public Affairs Officer in the San Antonio Regional Office of the INS, as well as information set forth in those four documents identified and entered into evidence as Respondent's Exhibits A through D.

Lourdes Gonzalez Lopez (Ms. Lopez), the complaining witness, testified that she was then 19 years of age, having been born in San Luis Potosi, Mexico on February 11, 1977. Her immigration status since having arrived at age four in Laredo, Texas with her parents on June 29, 1981 is that of permanent resident alien (Complainant's Exh. 2).

Her parents were given her Form I-551 card, or "green card", #A036744281, which was apparently issued on June 25, 1994 since it bears an expiration date of June 24, 2004 (Complainant's Exh. 6) and was retained by them. On or about the 1994 renewal date, Ms. Lopez had gone to an INS office to renew her I-551 card and to be photographed. She stated that INS had kept the Form I-551 which she stated had been issued earlier and she did not receive the renewal Form I-551 card, presumably because of her family's change(s) of address.

In January, 1996 she was employed as a day care worker/substitute teacher at Victoria Courts Day Care and planned to enroll at San Antonio College in September of that year. The documents that she had provided to that employer upon starting work in May, 1995 consisted of her expired Form I-94 card, her unrestricted Social Security card and her Texas ID card, which was later lost (T. 80). On Tuesday, January 23, 1996, she saw a help wanted sign at the respondent McDonald's restaurant at 721 San Pedro Avenue in San Antonio. She applied for a counter position and interviewed with the owner, Mr. Acosta, who hired her and instructed her to return on the following day, Wednesday, January 24, 1996, for orientation.

On the late afternoon of Wednesday, January 24, 1996, she went to the restaurant for the orientation program and discovered that she did not have her Texas ID card. However, she did have the other two documents, her expired INS Form I-94 card and her Social Security card. On arriving, she saw one of Mr. Acosta's assistants, Ms. Montez, at the front counter on the first floor and told her that she did not have her Texas ID card. She and Ms. Montez went to a small office downstairs where she presented her expired I-94 card and her Social Security card. Ms. Montez took her to Mr. Acosta, who told her that he had not seen an I-94 card previously, "so he had to inquire. He was going to check it out." (T. 90). Mr. Acosta told her to go to the INS office and fill out a Form I-765 and return with a written receipt for that form. She did not fill out a Form I-9 on that date, nor was she allowed to remain for the group orientation, nor did she ever enter the room in which the other new employees assembled for their orientation, in the room located next to Mr. Acosta's office.

On the next day, Thursday, January 25, 1996, she went to the Texas Department of Public Safety and applied for a replacement Texas ID card and she was given a temporary Texas ID card (Complainant's Exh. 3) and then, in the company of her mother and a two-year old child then being cared for by her mother, she went to the San Antonio Regional Office of the Immigration and Naturalization Service (INS). At the INS office, she requested a Form I-765, which is a work authorization application form, as Mr. Acosta had instructed her to do, and was assigned a number. When that number was called, she was sent to Mr. Saucedo, an INS supervisory employee, and told him that she had not received her "green card". He had her fill out an inquiry form, G-731 (Complainant's Exh. 8), which was then sent to the Immigration Card Facility in Arlington, Texas in order to have INS search for her current permanent resident alien card, Form I-551. He also extended her expired Form I-94 card for use in securing employment by placing his handwritten notation on the rear of that card noting that it was being extended for one year, or until January 24, 1997, and he also placed his employee number next to that date (Complainant's Exh. 2 at 2).

She then returned to McDonald's on the same day and again presented her then extended Form I-94, which Mr. Saucedo had just extended to January 24, 1997 (Complainant's Exh. 2 at 2), and her newly-acquired temporary Texas ID card to Mr. Acosta. But Mr. Acosta would not accept her extended I-94 and told her that he would contact her later because he had to "look into it".

On the next day, Friday, January 26, 1996, Mr. Acosta advised her by telephone that he could not accept either of the documents which she had presented on the previous day because "someone had told him, his sources." that he could not do so (T. 50). On that same day, she again returned to the INS office but it was closed (T. 49, 50).

On Monday, January 29, 1996, she returned to the INS office for the third time and was issued a new Form I-94 card (Complainant's Exh. 4), containing a photograph of her as she appeared at the hearing, and one that appeared identical to the photograph of Ms. Lopez displayed on her expired I-94 card. The newly-issued card of January 29, 1996 clearly contained

the information that Ms. Lopez had been processed for temporary evidence of lawful admission for permanent residence, that the card was valid until January 28, 1997, and that she was specifically "employment authorized" (Complainant's Exh. 4).

Ms. Lopez testified that she again returned to McDonald's on that same day but Mr. Acosta was not there. She spoke to Ms. Montez and another unidentified woman. She presented three documents, the newly-issued Form I-94 (Complainant's Exh. 4), her then four-day old temporary Texas ID card (Complainant's Exh. 3) and her Social Security card (Complainant's Exh. 5) but Ms. Montez would not accept those documents. Instead, Ms. Montez requested that she leave the documents with her, but she declined to do so. She later spoke to Mr. Acosta by telephone and learned that he would not accept those documents, either (T. 53) and that "he still wanted his I-765." (T. 101). She testified that at that point she lost interest in working for Mr. Acosta.

On February 7, 1996, because she felt that Mr. Acosta had wrongly refused to accept her identity and employment eligibility documents, she filed a document abuse charge with OSC.

Ms. Lopez also testified that she had presented her Social Security card numbered 462-61-1207 (Complainant's Exh. 5) to personnel at respondent McDonald's on three occasions, on Wednesday, January 24, 1996, on Thursday, January 25, 1996, and on Monday, January 29, 1996 (T. 55).

Following her visit to the INS office on Thursday, January 25, 1996 and speaking to Mr. Saucedo, the INS Immigration Card Facility mailed her new resident alien card, Form I-551 (Complainant's Exh. 6), which she received by mail after Monday, January 29, 1996, and prior to February 14, 1996.

On February 14, 1996, some 22 days after meeting Mr. Acosta, she resumed work in a counter position at another McDonald's in San Antonio, one not owned by Mr. Acosta. Her starting hourly wage of \$4.50 was increased to \$4.85 and she worked 33 hours weekly until beginning her college studies at San Antonio College, as she had planned, in September, 1996, when her hours were reduced to 20-25 each week (T. 60, 61).

Mrs. Gloria B. Gonzalez Lopez (Mrs. Lopez), the mother of Ms. Lopez, testified that she had accompanied her daughter to Mr. Acosta's McDonald's and also to the INS office in order to secure an extension of the date on her daughter's Form I-94 card (Complainant's Exh. 2). After leaving INS, they returned to the McDonald's restaurant and Ms. Lopez spoke to Mr. Acosta but she did not hear any portions of their conversation.

On cross-examination, Mrs. Lopez testified that she had received her daughter's alien registration card from INS in 1981 when Ms. Lopez was three years of age and had retained it until INS updated her daughter's photograph on that card, and it presumably became lost in that updating process. She also testified that Ms. Lopez later received a Form I-94 card and also received a new Form I-551 card from INS.

Cristobel Saucedo (Mr. Saucedo) testified that he has served as a District Adjudications Officer in the San Antonio Regional Office of the INS since 1995. During January, 1996 he served as the Duty Officer in that office and in that capacity he met Ms. Lopez on Thursday, January 25, 1996.

He stated that Ms. Lopez had come to the INS office to check the status of her permanent resident alien card and she presented a temporary Form I-94 card containing a valid stamp with an expired date. Using the information on that card, he conducted a central index search of the INS data base and the computer printout (Complainant's Exh. 7) disclosed that Ms. Lopez had been brought to the United States on June 29, 1981 by her parents, Juan and Gloria Lopez, entering at Laredo, Texas. Her immigration status on the search date continued to be that of permanent resident alien (T. 124).

Ms. Lopez told him that she had previously filed a Form I-90 and paid the required fee in order to have been furnished with an updated permanent resident alien card, a Form I-551. Upon learning that, he checked with INS' Immigration Card Facility in Arlington, Texas and learned that her updated card had been mailed to her but had been returned as undeliverable and that the card was being held for her at that facility. He then sent a Form G-731, Inquiry About Status of I-551 (Complainant's Exh. 8), to the Immigration Card Facility to inquire formally so that the current Form I-551 card would be mailed to Ms. Lopez's then current mailing address (T. 131). As noted earlier, a new Form I-551 was subsequently mailed to and was received by Ms. Lopez on an undetermined date, but presumably in early February, 1996.

Mr. Saucedo identified Complainant's Exh. 2 as being a copy of the expired Form I-94 which Ms. Lopez presented to him on Thursday, January 25, 1996. That document disclosed that she had been provided with temporary evidence of having been granted lawful and permanent admission to the United States. Because it had been issued to Ms. Lopez at age four in 1981, she was required to obtain a new permanent resident card upon reaching 14 years of age. This is accomplished by the holder's going to an INS office and being photographed and fingerprinted.

He also testified that the expired Form I-94 which Ms. Lopez presented had been issued on August 20, 1992 and that it contained this stamped wording: "Processed for I-551. Temporary evidence of lawful admission for permanent resident. Valid until _____. Employment authorized.". The handwritten date of August 19, 1993 appeared on the stamped blank date line. He stated that Ms. Lopez's photograph on the front of that expired I-94 card was a good likeness of her as she appeared on January 26, 1996 (T. 136).

In checking the rear portion of that expired Form I-94 (Complainant's Exh. 2 at 2), he determined that on November 4, 1993, that document had been extended for six months, or until May 3, 1994.

Mr. Saucedo stated that on Thursday, January 25, 1996 he placed another handwritten notation on the reverse side of that document, extending it to January 24, 1997 and that he had also written in "#15", his employee identification number. That handwritten extension effectively established Ms. Lopez's identity, as well as her employment eligibility, until January 24, 1997.

He also identified Complainant's Exh. 4 as being a copy of a Form I-94 issued by one of Mr. Saucedo's INS co-workers to Ms. Lopez some four days later on Monday, January 29, 1996, which extended that card's validity, for identity and employment eligibility purposes, to January 28, 1997.

On cross-examination, Mr. Saucedo disclosed that he could not recall Ms. Lopez having told him that Mr. Acosta had sent her to the INS office to "file the 765". He testified that even if she had, the use of a Form I-765 was, in his words, "out of the question" because a Form I-94, with an added stamp, such as the one she had presented to him in the INS office on Thursday, January 25, 1996, would have effectively ruled out the use of a Form I-765. He also testified that he would not have allowed Ms. Lopez to file a Form I-765, and pay the required fee to check the status of her permanent resident alien card because her expired Form I-94 was in fact proof of her permanent resident alien status, thus rendering the Form I-765 "irrelevant" (T. 142).

Mr. Saucedo repeated his earlier testimony that Ms. Lopez's expired Form I-94 was temporary evidence of her immigration status as that of being a permanent resident alien. If that document contains an expired date, as did Ms. Lopez's card, her status as a permanent resident alien was not affected in any way, she simply did not then possess an I-94 card which could serve as proof of both her permanent residence and employment authorization. He also testified on cross-examination that as of Thursday, January 25, 1996, however, his handwritten notation on the rear of Ms. Lopez's Form I-94 had effectively extended her proof of permanent residence and her employment eligibility to January 24, 1997 (T. 145, 146).

Respondent's initial witness was James Raymond Dudley (Mr. Dudley), the Employer Relations Public Affairs Officer in the San Antonio District Office of the INS, who was subpoenaed by respondent. He testified that he is familiar with the INS Form I-94, described by him to be a document issued to legal immigrants arriving at airports. They are temporary documents which frequently carry the stamped notation "employment authorized" and "in most cases will have an expiration date" (T. 179). If such a document is presented to a prospective employer as evidence of work eligibility, "under column C" of the Form I-9 listings, it should be supported "by an ID of some sort" (T. 180).

Mr. Dudley described Complainant's Exh. 2 as being a reproduction of a Form I-94 which was valid until August 19, 1993. The rear portion of that form reveals that on November 4, 1993 the employment authorization had been extended for six months to May 3, 1994. He stated that based upon those notations Ms. Lopez had not been work authorized between the dates of August 20, 1993 and November 4, 1993. Another unstamped notation on that form revealed that Ms. Lopez's work authorization had been extended to January 24, 1997. He concluded that from

May 3, 1994 to January 25, 1996 Ms. Lopez “was working without authority to do so” (T. 180-183). He also expressed the opinion that because the third written extension granted to Ms. Lopez had not been stamped, because it had not been initialed, and because the date of the issuance of the work authorization was not noted it was in fact different from the two previous extensions and was therefore a “somewhat suspicious document.” (T. 184).

Upon examining Complainant’s Exh. 4, he testified that that copy of the Form I-94 which had been issued to Ms. Lopez on January 29, 1996, extending her employment authorization to January 28, 1997, and containing the identical photograph of Ms. Lopez as that which appears on the Form I-94 identified as Complainant’s Exh. 2, as well as the identifying information, did in fact appear to be valid (T. 184). And in his opinion that document would have appeared valid to Mr. Acosta, also (T. 185). Upon further questioning by respondent’s counsel, Mr. Dudley testified variously that the older Form I-94, depicted in Complainant’s Exh. 2, would also have appeared to be valid to Mr. Acosta and later testified “but I think he would have questions about whether it’s valid or not” (T. 185, 186).

On cross-examination, Mr. Dudley stated that he first saw Ms. Lopez’s initial Form I-94, marked and entered into evidence as Complainant’s Exh. 2, some months ago when Mr. Acosta came to his office with a copy of that Form I-94 seeking Mr. Dudley’s “advice on whether or not I thought that was a legal document” (T. 194). He also spoke to Mr. Acosta about this case on two other occasions, “just prior to July, and I talked to him about two weeks ago” (T. 194, 195).

Mr. Dudley could not recall having spoken by telephone to complainant’s counsel of record/cross-examiner, Carol Mackela, Esquire, in May, 1996, nor could he recall the three page document packet which Ms. Mackela had faxed to him from her office in Washington, D.C. on the afternoon of that same date, to the fax number which he furnished to her in that telephone conversation, a telephone fax number which he admitted was his (Complainant’s Exh. 9). He stated that he could not recall “any of this” but conceded that the copy of the Form I-94 depicted on the second page of the faxed material (Complainant’s Exh. 9 at 2) appeared to be identical to that Form I-94 depicted in Complainant’s Exh. 2. He denied that he had told her in their May 6, 1996 telephone conversation that the Forms I-94, as shown in Complainant’s Exhs. 2 and 9 had been extended by someone named “Chris” and that that person was also “officer number 15” (T. 197).

Further questioning clearly established that it was Mr. Dudley’s belief that if Mr. Acosta had accepted as valid the extended Form I-94 which is pictured in Complainant’s Exh. 2, as well as an identity document from List B, such as a Texas ID card, that combination of documents would “certainly” have been acceptable for identity and employment eligibility purposes (T. 199). Similarly, he had no reservations concerning the validity, for identity and employment eligibility purposes, of the Form I-94 containing the January 29, 1996 one-year extension, or until January 28, 1997, as shown in Complainant’s Exh. 4 (T. 200).

Ms. Guadalupe Marie Montez (Ms. Montez), respondent's second witness, testified that she works as an administrative assistant at one of the three McDonald's owned and operated by Mr. Acosta in San Antonio. Part of her job duties includes conducting hour-long orientation programs at 4 p.m. each Wednesday for the eight to ten persons hired each week on average to fill entry level positions at the three restaurants.

On Wednesday, January 24, 1996, an orientation program was conducted at 4 p.m., as usual, in an office located in the basement of the McDonald's at 721 San Pedro Avenue. Upon coming to work that day, she found a note on her desk from Mr. Acosta, in which he advised her that he had interviewed and taken an employment application from Ms. Lopez on the previous day. He was anxious to hire her because she had worked previously at another McDonald's restaurant in San Antonio. Mr. Acosta also noted that he had instructed Ms. Lopez to attend the orientation on the afternoon of that date, Wednesday, January 24, 1996.

At the outset of that orientation, she passed out a packet to each participant, the second page of which was an INS Form I-9, which each new hire is to complete and each must also present identity and employment eligibility documents for that purpose. When asked to present her documents, Ms. Lopez told her that she had only one document, a Form I-94 card which had expired in 1993. She then showed Ms. Lopez the Lists B and C noted on the Form I-9, but she had none of those listed documents. Ms. Lopez also told her that she had no Social Security card "because she had been moving, something to that effect. She had been moving, so she didn't have one with her." (T. 210). She immediately took Ms. Lopez to Mr. Acosta's nearby office and he offered to help her and stated that he would call the INS office. She then returned to the orientation class.

She stated that another person in that orientation class had a problem with documents. A gentleman presented a military ID card and told her that he had forgotten his Social Security card but would bring it in on the following day and he did so.

Ms. Montez testified that she was unaware of any happenings concerning Ms. Lopez which may have occurred on the next day, Thursday, January 25, 1996, because she did not see her again for the second and last time until Monday, January 29, 1996.

On Monday, January 29, 1996, according to Ms. Montez, Ms. Lopez returned to the restaurant and presented a temporary Texas ID card and the same Form I-94 and "all it had on it, it said EXT 1997 on it, and then she had her Texas ID card." Because Ms. Lopez had produced a receipt for her temporary Texas ID card she accepted that as a List B identity document and told her that she would be required to furnish a List C document in order to establish her employment eligibility (T. 218, 219).

Ms. Montez also stated that upon learning that she would be required to produce a work eligibility document from among those listed in the List C column of the Form I-9, Ms. Lopez “stated that she had already told me that she had lost her Social Security card; she didn’t have it; it hadn’t been received, because she had been moving, and she didn’t have one.” At that point, according to Ms. Montez’s testimony, Ms. Lopez started to cry whereupon Mr. Acosta again tried to help her and explained that he wanted her to work for him but that she had to produce the “proper ID”. At that point, Ms. Lopez said, “You all don’t know what you’re talking about”, and at that point Ms. Lopez left the restaurant (T. 219, 220).

Ms. Montez testified that Ms. Lopez had not presented the new Form I-94 (Complainant’s Exh. 4) upon returning to the McDonald’s on Monday, January 29, 1996, as Ms. Lopez had testified, and stated she had not seen that document prior to the hearing. And upon examining the new Form I-94 (Complainant’s Exh. 4) she testified that it appeared to “be genuine” and had Ms. Lopez presented that document and had she also have “seen that and seen a proper ID or the Social Security”, she would have “definitely” recommended to Mr. Acosta that Ms. Lopez have been hired and that “She would have started working.” (T. 220).

Ms. Montez also testified that had she refused to accept Ms. Lopez’s expired Form I-94 on January 29, 1996 because it had not been stamped to show that Ms. Lopez was work authorized, as the existing stamp placed there earlier had recited, and also because it did not contain a work authorization date. She also stated that on Monday, January 29, 1996 that Form I-94 did not appear to her to have been genuine and for that reason she did not have to accept it, according to the information provided to employers in the INS Handbook for Employers (T. 219).

On cross-examination, she stated that it is her practice to ask persons attending orientation sessions to leave if they do not present an acceptable combination of documents. She also testified that she does not permit anyone attending an orientation session to fill out Section 1 of the Form I-9 until that person has presented a combination of documents determined by her to be acceptable (T. 225).

Ms. Montez also testified that on Wednesday, January 24, 1996, she had looked at the photograph on Ms. Lopez’s expired Form I-94 card and that the person in that photograph did appear to be Ms. Lopez (T. 228).

Celia Acosta (Mrs. Acosta), the wife of Richard Acosta, testified that during the late afternoon or early evening of Tuesday, January 23, 1996 her husband paged her and advised her that on that date he had interviewed a girl who had worked at another McDonald’s previously, that he wanted to hire her and that he wanted to know if there was an orientation session scheduled to be conducted at 4 p.m. on the following day, Wednesday, January 24, 1996.

She was not in the restaurant on the latter date but was there on Monday, January 29, 1996, when Ms. Lopez came in to see her husband and Ms. Montez. She stated that Ms. Montez asked Ms. Lopez whether she could obtain a school report or a school ID and she replied that she

could not. When Ms. Montez inquired about a Social Security card, since Ms. Lopez had worked previously, she told her that she had lost her Social Security card and began to cry. At that point, Mr. Acosta told Ms. Lopez that he wanted to offer her a job but that proper documentation was required.

She also testified that Ms. Lopez had not been denied employment and that she was a desirable hire, given her good prior work experience at another McDonald's restaurant, and also because she had been given good references. In addition, that prior work experience would reduce or save the \$555 average training cost which McDonald's incurs in hiring each new employee.

Mrs. Acosta stated that another restaurant chain, Taco Cabana, had been "fined thousands of dollars" as a result of unexplained events in connection with its operating a restaurant in San Antonio, according to an article in an unidentified San Antonio newspaper.

She also recounted that Mr. Acosta provided a copy of that newspaper article to each person working in the office and required them to read it, presumably in order to avoid an involvement of that type in operating their three McDonald's restaurants in San Antonio.

Richard Acosta (Mr. Acosta), respondent's final witness, testified that he has been a McDonald's franchisee for some 22 years, that he operates three McDonald's and that "all our McDonald's sit in very prominent Hispanic markets" in San Antonio, Texas and that his work force is 95 to 98 percent Hispanic (T. 237). In reply to a question from his attorney on direct examination concerning whether he had "a soft heart for people from Mexico," he replied, "I try to help them. I try to help them as much as I can." (T. 239). He stated that his grandparents were from Mexico, as were his wife's parents. He has received many awards over the years, his firm was cited as the leading Texas employer of handicapped persons and McDonald's has recognized his operations on some 12 occasions. In addition, he testified that "--I sit as president of all the other McDonald owners to represent them on a national basis with McDonald's corporation. I'm a very involved operator with my business." (T. 237).

He stated that an optimum work force of 150 is needed in order to assign 50 employees to each of his three McDonald's restaurants. But owing to the low unemployment rate in San Antonio, as well as the competition for entry level workers, he employs an average of only 35 or 40 at each restaurant, or an average of only 105 to 120 employees in total.

Mr. Acosta stated that he first met Ms. Lopez early in the afternoon of Tuesday, January 23, 1996. He was in the lobby of his 721 San Pedro Avenue location and noted that she had an employment application. Following an interview, in which he learned that she had prior McDonald's experience, he told her he would contact her shortly. After Ms. Lopez left he called her former supervisor at the other San Antonio McDonald's and received a favorable report on her. Later that afternoon he telephoned Ms. Lopez to advise her that she had been hired, "subject to meeting the requirements", and that she was to report for orientation at 4 p.m. on the next day, Wednesday, January 24, 1996 (T. 241).

Ms. Lopez, according to his testimony, came to that orientation and brought only a single document, one which had expired. Ms. Montez then came to him, whereupon he decided to telephone the INS office in order to help Ms. Lopez and also because of recent publicity in San Antonio of INS having assessed fines “in the hundreds of thousands twice” against employers “for hiring people that were not legal” (T. 242).

He testified that he called the INS office and spoke to a woman and that he took detailed notes during their three to five minute conversation (Respondent’s Exh. A), but his handwritten notes of their conversation did not include her name. He also stated that the lady at INS instructed him to have Ms. Lopez come to the INS office and apply for a Form I-765, for which she could obtain a receipt. And upon her bringing that receipt back to him “you can put her to work” (T. 243). Mr. Acosta told Ms. Lopez “just to go take it over there and come right back, and we’d put her to work. And she left. I did not see her again until the 29th, which is Monday.” (T. 244).

Mr. Acosta stated on Monday, January 29, 1996 Ms. Lopez returned to the restaurant “with the same basic document, except someone had scribbled, “Extended to SNA number 15.”, which had no meaning for him and the document did not appear to be genuine (T. 245). Upon checking the INS Handbook he could find no parallel examples nor could he determine from the text that that procedure was acceptable. In addition, the color of the recent stamp was black, whereas the earlier INS stamp on that expired document had been bright red, nor did the stamp contain an extension date, nor did that stamp state that Ms. Lopez was work authorized.

He also testified that he then asked Ms. Lopez if she had a Social Security card, since she had worked previously, or whether she had a “school ID”, to no avail. He “showed her the list” and she replied “No, I don’t have anything; I don’t have anything; this has worked before; you should be able to do this. Other people have accepted this before.” (T. 244, 245).

On that date also, Ms. Lopez brought in another document with her expired Form I-94, which contained the notation “Extended to SNA number 15). The second document was the one identified as Complainant’s Exh. 3 and was “a temporary driver’s license” which he thought had been issued on January 25, 1996, or was just a receipt for an ID for which she had applied. He stated that “It has no picture; it has nothing. It’s a black and white piece of paper.” (T. 246, 247).

He made copies of both documents and returned them to Ms. Lopez with the explanation that “I cannot put myself in a position to be fined hundreds of thousands of dollars when I cannot establish that this is genuine and that it meets the requirements.” He asked her to return to the INS office to obtain the receipt for the Form I-765 and also stated that she could bring her Social Security card or any other documents on the lists in the INS Handbook and “we’ll put you to work” (T. 247, 248).

Mr. Acosta also testified that he has noted that in filing her charge with OSC on February 7, 1996, just nine days after their final meeting on Monday, January 29, 1996, Ms. Lopez “got her green card, her green alien card. She could have very easily walked back and said, Here is my green card now; it came through the mail, after you pushed me to get it. And we would have hired her. But she never came back. She got her card just nine days later, and she could have very easily come back and said, I’ve got my proper identification now, and it’s dated and she signed it on her statement there.” (T. 248).

When requested by his attorney to examine Complainant’s Exh. 4, which is a copy of the newly-issued Form I-94 which Ms. Lopez had obtained at the San Antonio INS Regional Office on Monday, January 29, 1996 and which had extended her employment authorization for one year, or until January 28, 1997, he testified that he did not see “anything wrong with that”. In fact, he further testified that had Ms. Lopez brought that document to him, together “with the receipt of the ID”, he would have hired her. He also stated that in the event that Ms. Lopez would come to his office “tomorrow and show you her alien registration card and any form of ID” he would hire her (T. 248, 249).

Further in Mr. Acosta’s direct testimony, he identified the single-page exhibit marked and entered into evidence as Respondent’s Exhibit A as being his handwritten notes reflecting his single telephone conversation with the San Antonio Regional INS Office in “trying to get Ms. Lopez qualified”. He explained his difficulty in getting “through to INS” and testified “so when I did get through, after several tries, I talked to an agent, and he told me what I needed to tell her, so I wrote it down, and I transferred that to one of my note pads with my stationary, and I put that down, and I gave that to Ms. Lopez, so she would have something to refer back, and then we made a copy of her driver’s license and this form (I-94) . . .” (T. 251, 252).

Mr. Acosta also testified that in having rejected Ms. Lopez’s expired Form I-94, which he felt also contained a questionable extension, and because a black stamp had been used instead of a red stamp, it simply had not reasonably appeared to have been genuine. He further believes that his rejection of that document was proper in view of the wording found on pages 13 and 14 of the INS Employer’s Handbook, “- - the instructions that I received from the federal government, if it does not look genuine, then I have the right to reject it.” (T. 254, 255).

On cross-examination, Mr. Acosta conceded that he was not aware that Ms. Lopez was a permanent resident alien who had not received her replacement “green card” from the INS nor did he know that she was then trying to do so but had not yet received that card.

Mr. Acosta also conceded that he is only “somewhat familiar” with the INS Handbook for Employers. That because he does not prepare or assist in preparing the Forms I-9 and that Ms. Montez, as well as his unidentified daughter, are more familiar with the handbook than he since “They’re the ones that really study the book real close. I do understand the book and will use it to go back and refer to it.” (T. 260, 261).

Then followed this sworn testimony concerning IRCA's discriminatory provisions:

Q Does the handbook refer to the anti-discrimination provision?

A I'm not - - am I familiar with the discrimination provision?

Q Does the Handbook for Employers cover the anti-discrimination provision?

A I'm sure it does.

Q Are you just guessing?

A Well, I'm sure it is. I mean, it's a federal policy and state policy, you know.

Q You admit that you have not read the Handbook for Employers carefully.

Is that correct?

A I have read it, and I refer to it. I would not know every single page, every single document, every single paragraph, ever single word.

(T. 261).

And when asked whether he had discussed the subject matter of this proceeding with anyone, other than his wife and his attorney, in order to prepare for his testimony at the hearing, Mr. Acosta testified that several months prior to the hearing he had visited Mr. Dudley, who testified earlier for the respondent, presumably at the latter's office in the INS Regional Office in San Antonio, because "I was trying to get a better understanding of the documents, of why she would have so many extensions, and - -" (T. 260).

In addition to the hearing testimony of Mr. Dudley, Ms. Montez, Mrs. Acosta and Mr. Acosta, respondent concluded its case by placing into evidence the signed and dated sworn affidavits of three persons, Guillermo Hernandez, Eduardo Valerio and Rita M. Segura.

Guillermo Hernandez attested in his August 2, 1996 single-page affidavit that he is a U.S. citizen and that he was then employed at Mr. Acosta's McDonald's at 721 San Pedro in San Antonio. He was present at the 4 p.m. orientation for new employees conducted by Ms. Marie Montez on Wednesday, January 24, 1996. He recounted that at the beginning of the orientation, "Marie asked everyone to present their ID's and Social Security cards for their I9s." He also advised that since he had been re-hired that orientation was his "second orientation and each time the orientation was done in the same way." (Respondent's Exh. B).

Rita M. Segura, another person who was employed by Mr. Acosta on August 6, 1996, the date upon which her sworn affidavit was taken, some four days after Mr. Hernandez's affidavit was executed, attested that she was a "legal resident alien" and worked at the McDonald's at 2922 Blanco Road in San Antonio. She also attended the January 24, 1996 orientation conducted by Ms. Marie Montez at 721 San Pedro. She recalled that "At the beginning of the orientation Marie asked everyone to present their IDS for their I9s." She recalled that a Hispanic female "was missing the required documents" and that Marie sat with her and showed her a list of documents, as she had done with others "who did not have the required acceptable documents." She stated that she had later been shown a copy of an ID card containing a female's photograph, which she identified as having been that of Lourdes Gonzalez Lopez, who "was the same person missing her documents." Ms. Segura also attested that she had worked for Mr. Acosta previously and that she had attended two orientations, both of which had been conducted in the same manner (Respondent's Exh. D).

Eduardo Valerio's affidavit was also dated August 6, 1996, some four days after that of Guillermo Hernandez, and reveals that he is a U.S. citizen and that he also attended the January 24, 1996 orientation program. He attested that "At the beginning of the orientation Marie asked everyone to present their IDs for their I9s and Social Security card could be one of them." He presented his military ID card and told Marie that since the card also contained his Social Security number she could simply copy the number. But she informed him that a person presenting a military ID was also required to provide another ID document and she showed him a list of acceptable documents. He then told her that his Social Security card was at his home and that he "could bring it the following day" (Respondent's Exh. C).

At the close of respondent's evidence, OSC presented two rebuttal witnesses, Messrs. Guillermo Hernandez and Eduardo Valerio, the same gentlemen whose sworn affidavits dated August 2, 1996 and August 6, 1996, respectively, had been placed into evidence as Respondents' Exhibits B and C.

Mr. Hernandez testified that he returned to work for Mr. Acosta for the second time on January 27, 1996 at the San Pedro location and that about eight other persons attended the orientation program on Wednesday, January 24, 1996. At the outset, Marie asked them to show their Social Security cards and their ID cards. He produced his Social Security card and his driver's license. Two persons in the group did not have their Social Security cards and were told to return the following week at the next orientation. One of those persons was a girl wearing glasses, with whom he later worked at that McDonald's and the other was "a big guy" with whom he had attended high school and who had been "a football player." (T. 268, 269). On cross-examination, he also testified that he had been requested by Mr. Acosta to furnish him an affidavit and that he had done so on August 2, 1996 (Respondent's Exh. B).

Mr. Valerio testified that he formerly worked part time for Mr. Acosta at the latter's McDonald's located at Blanco Road and Fresno in San Antonio from February 3, 1996 to about July 15, 1996. He also attended the orientation conducted by Marie Montez on Wednesday,

January 24, 1996. He stated that there were about 12 persons in attendance and that the orientation had been conducted at the McDonald's on San Pedro, located close to San Antonio College. At the outset, he was requested to show documents and he produced his driver's license and his military ID. He did not show his Social Security card because he did not have it with him since he had recently changed wallets and had removed it because of space limitations. At first, Marie sent word to him that because he didn't have his Social Security card he was to return to an orientation the following week. He told Marie about his Social Security card and she went to the office and then returned and told him that he could participate in the orientation and that he had one day "to bring your paperwork, in this case, it was my Social Security card." He showed his Social Security card to Ms. Montez on the following day and started working part time. On cross-examination, he testified that Marie had also asked all in attendance in the orientation whether they had their Social Security cards with them. He stated that he had also been requested by Mr. Acosta to prepare an affidavit for him (T. 276-279).

The remaining rebuttal evidence provided by OSC consisted of a two-page declaration (Complainant's Exh. 11), declared under penalty of perjury on November 19, 1996, from one Sherrye Walker, Chief of the Enumeration and Evidence Branch in the Office of Program Benefits Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland, a location well in excess of 100 miles from the hearing site, San Antonio, Texas.

That declaration recites that the records of that agency had been reviewed and disclose that Ms. Louise Gonzalez Lopez was born in Mexico on February 19, 1977, that the Social Security card numbered SSN 462-61-1207 had been issued to Louise Gonzalez Lopez on May 25, 1983, that Ms. Lopez's citizenship status information discloses that she had been classified as an "Alien allowed to work" and that as of November 19, 1996, Ms. Lopez had not been issued a replacement Social Security card.

Issue(s)

The threshold issue presented under these disputed facts is that of determining whether in its dealings with Ms. Lopez between the dates January 24-29, 1996, the respondent violated the document abuse prohibitions of IRCA, those set forth at 8 U.S.C. § 1324b(a)(6), as OSC has alleged.

In the event that respondent is found to have engaged in any proscribed document abuse practice, two additional issues must be addressed namely, the appropriate civil penalty sum to be assessed against respondent and whether Ms. Lopez is entitled to back pay.

Discussion, Findings and Conclusions

In maintaining this unfair immigration-related employment practice charge, based upon document abuse, on behalf of Ms. Lopez, OSC is relying upon the provisions of 8 U.S.C. §§ 1324b(a)(1) and 1324b(a)(6), which provide in pertinent part, that:

“Unfair Immigration-Related Employment Practices”

Sec. 274B. {8 U.S.C. 1324b} (a) Prohibition of Discrimination Based on National Origin or Citizenship Status.-

(1) General rule.- It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or * * * *

(6) Treatment of Certain Documentary Practices as Employment Practices.-For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 274A(b), for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

(emphasis added)

IRCA's provisions concerning proven document abuse violations provide for a civil penalty “of not less than \$100 and not more than \$1,000 for each individual discriminated against.” 8 U.S.C. § 1324b(g)(2)(B)(iv)(IV).

OSC's evidentiary burden of proof in connection with this allegation of unfair immigration-related employment practice based upon document abuse is that of establishing by a preponderance of the evidence, 8 U.S.C. § 1324b(g)(2)(A), that Acosta violated the provisions of 8 U.S.C. § 1324b(a)(6) in the manner alleged.

In its June 6, 1996 Complaint OSC alleged that respondent had engaged in improper document abuse practices and did so on three occasions, on January 24, 26, and 29, 1996.

More specifically, in its six-page initiating pleading OSC charged that Ms. Lopez had been interviewed by Mr. Richard Acosta, had been offered a job, and was instructed by him to report for and bring documentation to an orientation program conducted on January 24, 1996. The Complaint further alleged that on that date, as well as on January 26 and 29, 1996 respondent refused to honor legally sufficient documents tendered by Ms. Lopez that reasonably appeared genuine, that respondent also requested that Ms. Lopez produce more or different documents than required for Form I-9 purposes, and that respondent also had refused to hire Ms. Lopez because she was unable to comply with that request.

On July 23, 1996, Acosta filed its two-page Answer, which consisted of a general denial of all of the allegations in the Complaint. Respondent did not assert any affirmative defenses in that responsive pleading, nor did it amend its responsive pleading in any manner in the 141-day period between that filing date and the date of the hearing, December 11, 1996, in order to assert that or any other affirmative defenses.

Respondent alleges in its post-hearing brief that all of the disputed events concerning Ms. Lopez having presented valid documents to respondent occurred on January 24 and 29, 1996 i.e. that no “facts of relevance” involving Ms. Lopez and respondent took place on Friday, January 26, 1996, as OSC has alleged.

That line of argumentation was prompted by the fact that although OSC had alleged that respondent had subjected Ms. Lopez to document abuse practices on January 24, 26, and 29, 1996, respondent is apparently of the opinion that OSC’s evidence concerning those allegations reveals that those violations occurred, instead, on Wednesday, January 24, 1996, on Thursday, January 25, 1996, and on Monday, January 29, 1996, i.e. that respondent had not engaged in document abuse practices on Friday, January 26, 1996.

Respondent also maintains that “the case revolves and rests with the good faith efforts of the respondent to comply with and, in fact, not violate the provisions of 8 U.S.C. §§ 1324a and 1324b and still fill its needs for qualified help”.

Respondent further urges that it has been cited for having violated “the letter of the law, while its good faith efforts were directed at attempting to proceed cautiously in its attempt to pursue the spirit of the law” for its benefit and that of Ms. Lopez.

In view of the foregoing, it should be noted that the pertinent provisions of IRCA make it unlawful for an employer to knowingly hire aliens not authorized for employment in the United States. 8 U.S.C. § 1324a(a). In addition, IRCA’s employment verification system requires that all employers verify the identity and employment eligibility of all persons hired after November 6, 1986, by viewing certain specifically described documents or combinations of documents and completing an Immigration and Naturalization Service Form I-9 within three days of hire. U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(a); Costigan v. NYNEX, 6 OCAHO 918, at 6 (1997).

The Form I-9, or Employment Eligibility Verification form, is a two-sheet document containing three pages of printed materials. The face sheet contains three sections, an Employee Information and Verification portion which the employee is required to complete and also to affix his/her signature, a second section, Employer Review and Verification, which is to be completed and signed by the employer, and a third section, Updating and Reverification, which is to be completed and signed by the employer, also, if needed. On the reverse side of the face sheet are the descriptions of the acceptable Lists A, B and C documents. The third page contains

the self-explanatory instructions for use in preparing the Form I-9 (Complainant's Exh. 10). Employers are clearly advised in the section 2 wording that specified documents from Lists, A, B and C are to be examined and utilized to determine the identity and employment eligibility of all job applicants.

List A documents establish both identity and employment eligibility and include United States passports, certificates of United States citizenship, certificates of naturalization, unexpired foreign passports with attached employment authorization and alien registration cards with photographs, i.e. Form I-151 or Form I-551, or “green cards”. Accordingly, any job applicant presenting a single document from List A effectively establishes both his/her identity and his/her employment eligibility and no other documents need be furnished.

List B documents establish the applicant's identity only and include, among others, a State-issued driver's license or an ID card issued by federal, state, or local government agencies or entities provided it contains a photograph or, in the alternative, information such as the person's name, date of birth, sex, height, weight, and color of eyes. Resultingly, all persons providing a List B identity document must also furnish a List C employment eligibility document.

List C documents establish the person's employment eligibility only and include, among others, an original Social Security number card (other than a card stating it is not valid for employment), a birth certificate issued by State, county, or municipal authority bearing a seal or other certification, and an unexpired INS employment authorization. It can be seen that all individuals having presented a List C employment eligibility document must also provide a List B identity document.

In summary, any person has the option of presenting a List A document which establishes his/her identity and employment eligibility and no other documentation is necessary for Form I-9 purposes. In the alternative, and in the absence of possessing a List A document, a person must produce a List B document and a List C document to determine his/her identity and employment eligibility, respectively. And employers may not establish stricter eligibility requirements, nor may they request or demand specific, additional or different documents for Form I-9 purposes.

The legislative history of IRCA makes clear that the “reasonable man standard” is to be used in implementing the [employment verification system and] that documents that reasonably appear to be genuine should be accepted by employers without further investigation of those documents. See H.R. Rep. No. 99-682 (I), 99th Cong., reprinted in 1986 U.S. Code Cong. & Admin. News 5659, 5666 (1986).

With those employment eligibility verification parameters in mind, let us review the sequential relevant happenings in this disputed factual scenario.

On Tuesday, January 23, 1996 Ms. Lopez went to respondent's McDonald's located at 721 San Pedro, close on to San Antonio College, where she planned to and did attend classes beginning in September, 1996, some eight months later. She came because she had seen a help wanted sign at that restaurant. Upon completing an employment application (Complainant's Exh. 1) she was interviewed and hired by Mr. Acosta on that date and told to report for an orientation session at that restaurant on the next day, Wednesday, January 24, 1996. Her account of the happenings on that date agrees with that of Mr. Acosta, except that he maintains that he had hired her "subject to meeting the requirements".

We move now to Wednesday, January 24, 1996, at about 4 p.m., the scheduled weekly starting time for an hour-long orientation program for the eight to ten persons whom the respondent hires each week to maintain a 105 to 120-person work force to operate its three McDonald's operations in San Antonio.

Ms. Lopez stated that she arrived at the orientation on Wednesday afternoon and saw Marie Montez at the restaurant counter on the first floor. Being aware that Form I-9 documentation would be needed, she planned to present the same three documents she had shown to her then current employer, Victoria Courts Day Care, when she began working there eight months earlier, in May, 1995, her Texas ID card, her expired Form I-94 and her unrestricted Social Security card. On arriving at the restaurant, she discovered that her Texas ID card was missing. After telling Ms. Montez that she had lost her Texas ID, she and Ms. Montez went downstairs to a small office and she presented an expired Form I-94 card and her Social Security card to Ms. Montez, who then took her to the nearby office of Mr. Acosta, who told Ms. Lopez that because he had not seen a Form I-94 previously, "he had to inquire" and that he "was going to check it out". Mr. Acosta told her to go to the INS office and to fill out a Form I-765 and to return with a written receipt for that form. Ms. Lopez maintains that she did not enter the room in which the orientation was held because she was not allowed to remain for the group orientation since she had been told by Mr. Acosta to go to the INS office, nor did she complete a Form I-9.

Ms. Montez recounted that at the group orientation on that date, she passed packets to each participant, including Ms. Lopez, who was asked to present her documents. Ms. Lopez told her that she had only one document, an expired Form I-94 card, and that she had lost her Social Security card. She immediately took Ms. Lopez to see Mr. Acosta in his office close by. She heard Mr. Acosta offer to help her and to call the INS office on Ms. Lopez's behalf. She then left and returned to the orientation class. Ms. Montez then saw Ms. Lopez at the restaurant for the second and last time some five days later, on Monday, January 29, 1996.

Mr. Acosta stated that Ms. Lopez had come to the orientation with only a single, expired document and that Ms. Montez had brought her to his office. He telephoned the INS office and spoke to an unidentified person whom he variously described as a woman initially and later as having been a male, and that before he could "put her to work" Ms. Lopez would have to file for a Form I-765, which is a work authorization application, at the INS office and obtain a receipt. Upon presenting that receipt to Mr. Acosta, Ms. Lopez could begin work. He stated that Ms.

Lopez left for the INS office but did not return that day and that he did not see her again until Monday, January 29, 1996, some five days later.

We now examine the reported happenings on the following day, Thursday, January 25, 1997.

Ms. Lopez, accompanied by her mother and a two-year old whom the latter was caring for, went to the Texas Department of Public Safety and was issued a temporary Texas ID card, a List B document which serves to identify a job applicant for Form I-9 purposes. She then went to the INS office and met Mr. Saucedo, the Duty Officer, who extended her expired Form I-94, by placing a handwritten, one-year extension, until January 24, 1997, as well as his employee number, on the reverse side of that card, for Ms. Lopez's use in securing employment. Mr. Saucedo, being aware that Ms. Lopez was a permanent legal resident, also arranged to update her resident alien card, Form I-551. Ms. Lopez returned to the restaurant and saw Mr. Acosta in conversation with a gentleman. When Mr. Acosta became available she attempted to show him her just extended I-94 card and her newly-issued temporary Texas ID card receipt. He looked at the documents and told her that he would "look into it" and contact her later. She spoke to Mr. Acosta by telephone on the following day, Friday, January 26, 1996, and he advised her that he could not accept either of those documents. She returned to the INS office but it was closed.

Inferentially, Ms. Montez and Mr. Acosta did not see Ms. Lopez on Thursday, January 25, 1996, since both testified that neither saw Ms. Lopez again after Wednesday, January 24, 1996 until the following Monday, January 29, 1996, or five days later.

We now attempt to determine the relevant events which occurred on Friday, January 26, 1996. Ms. Lopez stated that she received a telephone call from Mr. Acosta concerning the two disputed documents, her extended Form I-94 and her temporary Texas ID card, of the three documents she had provided to him in the restaurant on the previous day. Mr. Acosta advised her that he could not accept either of those documents because he had been advised by unnamed "sources" that he could not do so. Ms. Lopez again went to the INS office but it was closed.

That leads us to the final date of interest, Monday, January 29, 1996. Ms. Lopez testified that she went to the INS office for the third time and received a newly-issued I-94, containing a photograph (Complainant's Exh. 4). The stamped wording on that document, located immediately to the right of Ms. Lopez's photograph is identical to the stamped wording found on her expired/extended Form I-94 (Complainant's Exh. 2) and clearly recited that it had been issued on that date and was valid until January 28, 1997 and that Ms. Lopez was "Employment Authorized". As noted previously, she returned to the McDonald's with that newly-issued document but Mr. Acosta was not there but Ms. Montez and another lady, whom she did not know, were there. She presented three documents, the newly-issued Form I-94, the then four-day old temporary Texas ID card receipt and her Social Security card but Ms. Montez refused to take the documents. Instead, Ms. Montez wanted her to leave the documents with her and Ms. Lopez declined to do so. She then asked Ms. Montez when Mr. Acosta would likely return to the

restaurant and Ms. Montez stated that she did not know when he planned to return. Ms. Lopez then left and later spoke by telephone on that date to Mr. Acosta, who told her that he could not accept her new Form I-94 and that "he still wanted his I-765".

Ms. Montez, when questioned about the events of Monday, January, 29, 1996, testified that Ms. Lopez returned to the restaurant with a temporary Texas ID receipt and the same expired Form I-94, except that it contained additional handwritten notations, or as she expressed it, "all it had on it, it said EXT 1997 on it, and then she had her Texas ID card.". She accepted the temporary Texas ID receipt as a suitable List B identity document and asked Ms. Lopez to provide her with a List C document in order to establish her employment eligibility. At that point, according to Ms. Montez's sworn testimony, Ms. Lopez again told her that she had lost her Social Security card and then began to cry. She also testified that at that point Mr. Acosta attempted to assist her in producing the "proper ID", whereupon Ms. Lopez said, "You all don't know what you're talking about", and left the restaurant.

Mr. Acosta, in recalling the events of Monday, January 29, 1996, testified that on that date Ms. Lopez returned to the restaurant with two documents. One was the document depicted in Complainant's Exh. 3 and was "a temporary driver's license" which he thought had been issued on January 25, 1996 or that document was just a receipt for an ID for which she had applied. But he was wary of that receipt because, as he testified, "It has no picture; it has nothing. It's a black and white piece of paper." The second document which she presented on that date was "the same document with that SNA number 15, that extension, and --". He advised Ms. Lopez that he could not accept either document "when I cannot establish that this is genuine and that it meets the requirements".

Now that the disputed facts have been narrowed by the use of the testimonial and documentary evidence, we now examine the reasonable inferences to be drawn therefrom and discuss the applicable law, consisting of the pertinent statutory expressions, implementing regulations and document abuse rulings of this Office since the provisions of 8 U.S.C. § 1324b(a)(6) became effective on November 29, 1990.

The controlling OCAHO rulings disclose that there are at least three ways in which an employer can engage in proscribed document abuse. Initially, an employer's request, for purposes of satisfying the requirements of section 1324a(b), for more or different documents than are required by section 1324a(b) is treated as an unfair immigration-related employment practice. See, e.g., United States v. Strano Farms, 5 OCAHO 748 (1995) (employer violated document abuse provisions by having refused to accept acceptable work eligibility documents and demanding certain INS-issued documents); United States v. Louis Padnos Iron & Metal Co., 3 OCAHO 414, at 9 (1992).

Next, the choice of documents which a job applicant may present to a hiring person or entity in order to establish his or her identity and/or work eligibility is exclusively that of the job applicant and not that of the hiring person or entity. United States v. Strano Farms, 5 OCAHO 748, at 17 (1995); United States v. A.J. Bart, Inc., 3 OCAHO 538 (1993). OCAHO decisional law has therefore consistently held that an employer's insistence on a specific document or documents to verify identity and/or employment eligibility is also a violation. See, e.g., Westerndorf v. Brown & Root, 3 OCAHO 477, at 9 (1992) (Section 1324b(a)(6) prohibits a potential employer from demanding any particular document to satisfy the employment eligibility requirements of 8 U.S.C. § 1324b(a)(6)); United States v. Louis Padnos Iron & Metal Co., 3 OCAHO 414, at 9 (1992) (holding that a request for an INS-issued document for purposes of re-verifying an employee's Form I-9 work authorization "was in fact a request for more or different documentation than is required by that section of IRCA"); but see United States v. Zabala Vineyards, 6 OCAHO 830, at 16 (1995) (concluding that the phrase "more or different" "does not per se prohibit a request for specific documents, at least where those documents are in fact routinely presented in anticipation of such request or on demand") (citation omitted).

Finally, section 1324b(a)(6) also states that an employer's refusal to honor documents tendered that "on their face reasonably appear to be genuine" is also a proscribed practice. See, e.g., United States v. The Beverly Center, 5 OCAHO 762, at 5 (1995).

It should also be noted that the provisions of section 1324b(a)(6) have been interpreted to prohibit document abuse against any work authorized alien, such as Ms. Lopez. United States v. Guardsmark, 3 OCAHO 572, at 15 (1993); cf. United States v. Strano Farms, 5 OCAHO 748 (1994).

Given those decisional guidelines, we will again examine closely the relevant happenings involving the parties on each of the dates Wednesday, January 24, 1996, Thursday, January 25, 1996, Friday, January 26, 1996, and on Monday, January 29, 1996 in order to determine whether Acosta committed any document abuse violations.

On Wednesday, January 24, 1996, Ms. Lopez indisputably presented an expired Form I-94. She maintains that on that date, also, she presented an unrestricted Social Security card, or a card which does not recite that the card may not be used in order to obtain employment, and presented that acceptable List C employment eligibility document again on Thursday, January 25, 1996, and again for the third time on Monday, January 29, 1996.

It was clearly established that Mr. Acosta, to whom Ms. Lopez was taken by his administrative assistant, Ms. Montez, had not seen an I-94 previously and stated that "He was going to check it out." (T. 90). As recently as the previous afternoon, when Ms. Lopez filled out and signed his firm's employment application (Complainant's Exh. 1), Mr. Acosta had learned that she had then been employed full time for some eight months as a substitute teacher at Victoria Courts Day Care. He also learned at that time that Ms. Lopez had recently worked as a counter employee for 11 months, ending in February, 1995, for another McDonald's restaurant in

San Antonio. Those job duties were identical to those for which she was then applying at his McDonald's. He telephoned Ms. Lopez's supervisor at the other McDonald's and received favorable information about her. By his testimony, we learn that he wanted to hire Ms. Lopez "subject to meeting the requirements" (T. 241), and that he instructed her to return on the next afternoon to attend an orientation session.

Mr. Acosta's immediate decision to hire Ms. Lopez, presumably after receiving the excellent reference from her former McDonald's supervisor, was conveyed by pager telephone to his wife, Mrs. Acosta, at the restaurant (T. 230, 231) and by a written memo which he placed on the desk of Ms. Montez (T. 209). While both Mrs. Acosta and Ms. Montez agreed that Mr. Acosta was most anxious to hire Ms. Lopez, neither testified, or even indicated, that Mr. Acosta wanted to hire her "subject to meeting the requirements".

Upon seeing the admittedly unfamiliar expired Form I-94 document which Ms. Lopez had presented to Ms. Montez, Mr. Acosta immediately decided to contact the INS office in order to "help Ms. Lopez" and also to avoid fines "in the hundreds of thousands twice" which had presumably been assessed against a San Antonio restaurant operation which the INS has reportedly found to have been "hiring people which were not legal" (T. 242).

In his hearing testimony, Mr. Acosta described the INS person to whom he had spoken for some three to five minutes on the late afternoon of Wednesday, January 24, 1996 as having been female (T. 243). Later in his testimony, he described the INS person with whom he conversed on that single occasion as having been male (T. 251, 252). Mr. Acosta testified that he took detailed notes (Respondent's Exh. A) of his single conversation with that unidentified INS person, who informed him that Ms. Lopez should come to the INS office and apply for a Form I-765, which is a work authorization application form, and to obtain a receipt for that form, which would then allow Mr. Acosta to hire her, presumably because it would serve as a List A document which verified both her identity and her employment eligibility or as a List B identity document in the event that Mr. Acosta had by then been provided with an acceptable List C employment eligibility document by Ms. Lopez namely, her unrestricted Social Security card, as she testified that she had.

As to whether Ms. Lopez had presented an unrestricted Social Security card, or, as noted previously, one which did not contain wording to the effect that it was not valid for employment, on the afternoon of Wednesday, January 24, 1996, I credit her testimony over that of Mr. Acosta and find that she did so and thus presented an acceptable List C document for employment eligibility purposes on that date.

In doing so, I am aware that Mrs. Celia Acosta and Ms. Montez testified that Ms. Lopez had stated that she had lost her Social Security card. The mere fact that three witnesses testified against Ms. Lopez on the question of her having presented her Social Security card is not numerically persuasive. One cannot read a recitation of these controversial facts without becoming almost instantly aware that the two central disputants in this proceeding are Ms. Lopez

and Mr. Acosta. Given that fact, it is not surprising that the testimony of the latter's spouse and his subordinate, Ms. Montez, corroborate his version. Indeed, it would only be unusual if either had contradicted him on that critical point. In assessing the testimony of these four witnesses on that question, and after assigning to that testimony the reasonable inferences to which it is entitled, as well as considering the demeanor of those four witnesses, I credit the testimony of Ms. Lopez and find that she presented an unrestricted Social Security card to Ms. Montez and then to Mr. Acosta, also, on the afternoon of Wednesday, January 24, 1996. Their testimony on that point is called into question by the fact that a copy of Social Security card numbered SSN 462-61-1207, issued in the name of Lourdes G. Lopez, and containing the signature of "Lourdes Lopez" has been placed into evidence as Complainant's Exh. 5.

In addition, the likelihood of Ms. Lopez's having lost her Social Security Card, as Acosta contends, was effectively muted if not ruled out as a practical matter, by that portion of OSC's persuasive rebuttal evidence which consisted of the sworn declaration of the Social Security Administration's Enumeration and Evidence Branch Chief, Ms. Sherrye Walker (Complainant's Exh. 11). In that declaration we learned that Ms. Lopez had been issued the Social Security card numbered SSN 462-61-1207 on May 25, 1983, that her immigration status, in accordance with Ms. Lopez's evidence, is that of being an "Alien allowed to work" and more importantly for our further consideration, that Ms. Lopez had not been issued a replacement Social Security card as of November 19, 1996, or a date almost ten months following the events at issue in January, 1996, a most unlikely circumstance had she in fact lost her Social Security card at some time prior to January 24, 1996, a fact which Acosta's three adverse witnesses had attempted to establish by their testimony.

There is additional evidence which refutes respondent's contention that Ms. Lopez did not present a Social Security card. Ms. Montez testified that Ms. Lopez and one other person, a gentleman who turns out to be Mr. Eduardo Valerio, appeared in the orientation room without their Social Security cards. Ms. Montez was correct in so identifying Mr. Valerio but she did not correctly identify Ms. Lopez as having been the second person. That because Ms. Lopez testified that she did not join the group of new employees in the orientation room, as did Mr. Valerio and the others. Instead, Ms. Montez's testimony discloses that she took Ms. Lopez to Mr. Acosta's office because her single document, an expired Form I-94, did not reasonably appear to be genuine.

That additional evidence consists of the statements in the sworn affidavit of Rita M. Segura (Respondent's Exh. D). She was in the orientation room on the afternoon of Wednesday, January 24, 1996, and averred that Ms. Lopez was in that room, also, but she did not offer that information based upon her independent recollection of the events in question on that date. Instead, she identified Ms. Lopez upon having been shown a photograph of the latter, apparently at the time that her sworn affidavit was requested of her by Mr. Acosta. It was also revealed at the hearing that on the date that her affidavit was secured, as well as on the hearing date, she was employed by Acosta at its McDonald's at 2922 Blanco Road in San Antonio. Although apparently available to testify for Acosta on the hearing date, or even having been working at that

restaurant at the time the hearing was being conducted, respondent's counsel offered her sworn affidavit as Respondent's Exhibit D, over OSC's objection on the grounds that it had not been shown, as it had been in the case of the sworn affidavit of Ms. Sherrye Walker (Complainant's Exh. 11), that Ms. Segura was then more than 100 miles from the place of the hearing. The admission of that document as Respondent's Exhibit D effectively deprived OSC of its right to cross-examine Ms. Segura on that point. In addition, since Ms. Segura was then employed by Acosta one wonders why she did not testify at the hearing as did Ms. Montez, who was then working for Mr. Acosta, also.

Ms. Segura's opinion that Ms. Lopez was in the room in which the orientation was conducted on Wednesday, January 24, 1996 and that she did not have her Social Security card was very effectively called into question, if not indeed refuted, by that portion of OSC's rebuttal testimony provided by Mr. Hernandez, another employee from whom Mr. Acosta had requested an affidavit. Mr. Hernandez testified that two persons in the orientation group on January 24, 1996 did not have Social Security cards, one being a girl wearing glasses with whom he later worked at the McDonald's on San Pedro Avenue, and a second person, a young man with whom he had attended high school. The girl whom he had seen at the orientation was obviously not Ms. Lopez, who was not in the orientation room on that date, who does not wear glasses, and who quite obviously has never worked at Acosta's McDonald's restaurant on San Pedro Avenue, with Mr. Hernandez or with anyone else.

Further, it is simply not credible that a person whose Social Security card had in fact been lost prior to Wednesday, January 24, 1996, as respondent's witnesses contend, would not have applied for and been issued a replacement card during the ensuing ten month period, between January 24, 1996 and November 19, 1996, a fact which OSC's later search of the Social Security Administration records has certainly established.

OSC urges that in presenting her unrestricted Social Security card to Ms. Montez and Mr. Acosta on Wednesday, January 24, 1996 Ms. Lopez had provided respondent with an acceptable List C employment eligibility document. OSC also maintains, and quite correctly so, that in having presented her expired I-94 to Ms. Montez and Mr. Acosta on that date she also had furnished to Acosta a document which qualifies as one of the acceptable List B identity documents for Form I-9 preparation purposes. That because the pertinent implementing regulation, 8 C.F.R. § 274a.2(b)(1)(v)B(1)(v), provides that among the documents that can be provided for the purpose of establishing a person's identity, for Form I-9 purposes, includes an:

Identification card issued by federal, state, or local government agencies or entities. If the identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address;

Even a cursory inspection of Ms. Lopez's expired Form I-94 (Complainant's Exh. 2) reveals that it was a card issued by INS, a federal agency, for the purpose of identifying and relating to Ms. Lopez and that it contained a photograph which on or about January 24, 1996 accurately portrayed her, according to Acosta's employee, Ms. Montez (T. 228), an opinion also shared by Mr. Saucedo, the INS Duty Officer (T. 136, 162).

In addition, the INS Handbook for Employers, a publication upon which Acosta relies so heavily in contesting OSC's charges, clearly instructs all employers, at page 14, that expired documents may be utilized as List B documents by job applicants in order to establish their identity as long as any such document reasonably appears on its face to be genuine and also relates to the person presenting it.

Even the briefest examination of Ms. Lopez's expired Form I-94 (Complainant's Exh. 2), containing a photograph which admittedly accurately portrayed her face was obviously a document which related to her, and the clearly worded printed material describing her as a lawfully admitted permanent resident alien who was employment authorized, further established that the Form I-94 (Complainant's Exh. 2) was a document which reasonably appeared to be genuine, despite protestations to the contrary by Ms. Montez and Mr. Acosta.

It is abundantly clear, when this hearing transcript is read in its entirety, when all of the exhibits are examined closely, and when one has observed all of the hearing witnesses, and assigned the evidentiary weight to each which their testimony and demeanor dictate, that Mr. Acosta was extremely apprehensive, if not unduly intimidated, by having been presented Ms. Lopez's expired Form I-94 on the afternoon of Wednesday, January 24, 1996.

His testimony discloses that he was admittedly unfamiliar with the Form I-94, which caused him to telephone the INS office, a practice which is not required of any employer. Mr. Acosta testified that someone at INS had instructed him to have Ms. Lopez file a Form I-765, which is an application for employment authorization, even though Ms. Lopez was, by virtue of her status as that of a permanent resident alien, work authorized as a matter of law since June 29, 1981, the day she arrived in the United States at age four with her parents at the airport in Laredo, Texas. Thus there was never a need on her part to document her employment eligibility because it was quite incidental to her immigration status, that of permanent resident alien.

It is interesting to note that in the event that Mr. Acosta had told the INS person with whom he stated he had spoken for some three to five minutes on the late afternoon of Wednesday, January 24, 1996, that Ms. Lopez had presented an expired Form I-94 (Complainant's Exh. 2) which contained a photograph of Ms. Lopez and clearly worded and stamped printing to the effect that she had been legally admitted to the United States and was also "employment authorized", there would almost certainly have been no request for Ms. Lopez to file a Form I-765, an obviously incorrect form under these facts.

The fact that Mr. Acosta telephoned the INS, or contacted his unidentified “sources”, upon seeing Ms. Lopez’s expired I-94 reveals more about Mr. Acosta’s gross overreaction to that document than it does to any conceived deficiencies which he contends that document presented. Mr. Acosta attempts to justify his actions by noting that another restaurant operator in San Antonio had been assessed a very sizeable civil penalty sum for having hired illegal aliens and that he wanted to avoid a similar incident in operating his three McDonald’s in that city. But surely, Ms. Lopez, who was then 18 years of age when she applied for a job at his San Pedro Avenue location on Tuesday, January 23, 1996, who speaks articulately and without any accent, and who presented a continuous and confirmed satisfactory work history over the prior 22-month period, would hardly have appeared to fit any reasonably based profile of an illegal alien seeking employment. In addition, the documents which she furnished reasonably appeared to have been facially genuine.

Mr. Acosta’s lack of knowledge of the Form I-9 process generally, as well as his relative unfamiliarity with the INS Handbook for Employers contents, was demonstrated by his testimony which reveals his mistaken belief that any List B identity document had to contain a photograph of the person presenting such a document for I-9 purposes. He was unaware that, as has been discussed previously, a person can also effectively establish identity by the use of a document which lists the presenting party’s name, date of birth, sex, height, eye color, and address, as Ms. Lopez had done by presenting her temporary Texas ID card, which she obtained and showed to him on Thursday, January 25, 1996, along with her extended Form I-94 and her unrestricted Social Security card. And it is not necessary to refer to the INS Handbook for Employers to determine that fact because that can easily be determined by reading the clearly worded description of which documents are acceptable List B identity documents, which appears on the reverse side of the Form I-9 face sheet.

The respondent subpoenaed Mr. Dudley and adduced his hearing testimony in order to defend against OSC’s document abuse charges. Even a casual reading of his testimony reveals that in having done so Acosta simply misplaced a very significant measure of reliance. Viewed from any aspect, Mr. Dudley’s testimony lent support to OSC’s contentions rather than having justified any of Acosta’s actions.

Among other testimony which proved harmful to respondent, Mr. Dudley stated that the very documents presented to and rejected by Mr. Acosta on Thursday, January 25, 1996, the extended Form I-94 card and the temporary Texas ID card, were “certainly” acceptable to prove Ms. Lopez’s identity and employment eligibility. He also testified that the new Form I-94 which was issued on Monday, January 29, 1996 appeared to him to be valid, as it should have to Mr. Acosta, also. But that newly-issued Form I-94 was rejected by the latter, who somewhat stubbornly continued to insist that Ms. Lopez produce a particular document for documentation purposes, a receipt for a Form I-765, as a precondition for employment.

Although Mr. Dudley testified that he had been told by the respondent that Ms. Lopez had not presented a Social Security card, his testimony on cross-examination discloses that he suffered badly, as did Acosta overall in having adduced his testimony in defending these document abuse allegations.

Acosta may be of the opinion that it can avoid liability herein because it reasonably relied upon the information it supposedly received from an unidentified employee in the INS office in San Antonio, in effect an equitable estoppel defense.

Even in the event that respondent had asserted such an affirmative defense, that would have been unavailing. That because it is well established that the mere assertion of an erroneous oral statement supposedly made by a government agent, without more, is an insufficient basis upon which to apply the doctrine of equitable estoppel. Heckler v. Community Health Services, 467 U.S. 51 (1984). The Heckler ruling has been consistently applied since the earliest OCAHO decisions, U.S. v. Manos & Associates, d/b/a The Bread Basket, 1 OCAHO 130 (1989); U.S. v. San Ysidro Ranch, 1 OCAHO 183 (1990); U.S. v. Irvin Industries, 1 OCAHO 139 (1990).

In view of the foregoing, it is found that on Wednesday, January 24, 1996, Ms. Lopez presented to Acosta two legally sufficient documents that reasonably appeared genuine for Form I-9 purposes namely, an acceptable List B identity document, consisting of her then expired Form I-94 card containing her photograph, as well as a valid List C employment eligibility document, her unrestricted Social Security card, and that Acosta, acting by and through Mr. Acosta, refused to honor those documents. It is further found that in having done so, respondent violated the documents provisions of 8 U.S.C. § 1324a(a)(6) in the manner OSC has alleged in its Complaint. It is also found that respondent violated the document abuse provisions of IRCA by having demanded an additional or different document, the receipt for a Form I-765, which Ms. Lopez was requested to obtain and produce.

We now examine the events of Thursday, January 25, 1996, in order to determine whether Acosta committed document abuse(s) on that date, also.

Ms. Lopez obtained a temporary Texas ID card which, as has been noted previously, is an acceptable List B identity document. On that date, also, she obtained an extended Form I-94 at the INS from Mr. Saucedo, the Duty Officer on that date. Since that document contained her photographic likeness, because it also contained clearly worded, printed employment authorization, and reasonably appeared to be genuine, it was an acceptable List A document which served to furnish to employers both her identity and her employment eligibility until January 24, 1997. And she also presented to Mr. Acosta her Social Security card, which is an acceptable List C document, one which demonstrated her employment eligibility.

Upon having been shown those documents, Mr. Acosta advised Ms. Lopez that he would “look into it” and contact her later. On the following day, Friday, January 26, 1996, he telephoned Ms. Lopez and told her that he would not accept those documents, either, impliedly signalling that he was adamant in his demand that she obtain an INS receipt for a Form I-765 before she could begin work at his McDonald’s.

By doing so, Ms. Acosta also violated the document abuse provisions of IRCA, as OSC has alleged, by refusing to accept the facially genuine documents which Ms. Lopez had presented on the previous day.

I further find that since his oral rejection of those documents was conveyed to Ms. Lopez in his telephone conversation of Friday, January 26, 1996, another violation of the document abuse provisions of 8 U.S.C. § 1324b(a)(6) occurred on that date, as OSC has alleged in its Complaint.

The happenings of Monday, January 29, 1996 will now be scrutinized in order to determine whether Mr. Acosta committed any additional violative practices. On that day, also, Ms. Lopez presented documents from Lists A, B, and C, as she had done on Thursday, January 25, 1996. The List A document, her newly-issued Form I-94, was certainly an acceptable identity and employment eligibility document, and her temporary Texas ID card was offered as an identity document for the second time. In addition she proffered a List C document, her Social Security card, for the third time. OSC’s evidence discloses that on that occasion Ms. Montez, acting in the absence of Mr. Acosta, requested that Ms. Lopez leave those documents, but Ms. Lopez prudently declined, most probably because of the difficulty she had experienced in obtaining the temporary Texas ID and the newly-issued Form I-94 cards during the preceding five-day period. OSC’s evidence disclosed that Mr. Acosta later advised Ms. Lopez by telephone that she would still be required to furnish a written INS receipt for a Form I-765 as an apparent precondition of employment.

Mr. Acosta’s and Ms. Montez’s recollections of the relevant events which took place on Monday, January 29, 1996 are markedly different, as the previous summaries of their testimony disclose. Basically, they both contend that Ms. Lopez returned to the restaurant, and that Ms. Lopez had spoken to both of them. More importantly, each testified that Ms. Lopez had presented the identical documents which Mr. Acosta had so emphatically rejected on Thursday, January 25, 1996. Those two documents consisted of the extended Form I-94 (Complainant’s Exh. 2) and the temporary Texas ID card (Complainant’s Exh. 3). Both denied having been shown any other documentation on Monday, January 29, 1996.

Their sworn testimony of those points is simply not credible when compared to that of Ms. Lopez in recounting her recollection of the relevant happenings of that date. She testified that she had presented her newly-issued Form I-94, her temporary Texas ID card and her Social Security card to Ms. Montez, in Mr. Acosta’s absence. In addition, that portion of the documentary evidence which OSC has made available, the newly-issued Form I-94 (Complainant’s Exh. 4),

issued on that very date, Monday, January 29, 1996, and which had been shown to, and found to have appeared to be valid by, Mr. Acosta (T. 248, 249), by Acosta's witness, Mr. Dudley (T. 185, 186), and Ms. Montez (T. 219, 220).

It might be well to review the testimony, the documents entered into evidence and the reasonable inferences one may reasonably draw from those informational sources. On Monday, January 29, 1996, Ms. Lopez was most anxious to obtain a counter position at Mr. Acosta's McDonald's. She had been told six days earlier, on Tuesday, January 23, 1996, by Mr. Acosta that she had been hired and most probably had by then resigned her position at Victoria Courts Day Care. On Thursday, January 25, 1996, she obtained two acceptable documents, the extended I-94 card and a temporary Texas ID card, and presenting them to Mr. Acosta, who rejected them on the following day, despite the fact that Ms. Montez found the temporary Texas ID card to have been an acceptable List B identity document.

On Monday, January 29, 1996, the sixth day of her contacts with Mr. Acosta, Ms. Lopez visited the INS office for the third time and secured a newly-issued I-94 card, a copy of which has been made available as Complainant's Exhibit 4, which Mr. Acosta and Ms. Montez have found to be a perfectly satisfactory List C employment eligibility document. Bearing in mind that Ms. Montez testified that on Monday, January 29, 1996 Ms. Lopez appeared at the restaurant with the same expired Form I-94 card and a temporary Texas ID card, which she had found, and so advised Ms. Lopez on that date, to have been an acceptable List B identity document, it would appear that by then Ms. Lopez had indeed presented the necessary Lists B and C documents. That logical conclusion cannot be reached, according to the testimony of Mr. Acosta and Ms. Montez, to the effect that Ms. Lopez did not present the newly-issued Form I-94 card on that date.

In advancing that argumentation, Acosta would have one believe that in having gone to the INS for the third time on Monday, January 29, 1996, because she had been previously advised by Mr. Acosta as early as Thursday, January 25, 1996, that her expired/extended Form I-94 card was not acceptable, Ms. Lopez would return to Mr. Acosta's McDonald's with the identical and previously rejected expired/extended Form I-94 card and present it for the second time, rather than showing them the newly-issued Form I-94 which she just received at the INS office immediately prior to going to Mr. Acosta's McDonald's on that date.

In view of the foregoing, I find that Ms. Lopez presented her newly-issued Form I-94 card (Complainant's Exh. 4), as well as her then four-day old temporary Texas ID card (Complainant's Exh. 3), and her Social Security card (Complainant's Exh. 5), to Mr. Acosta and Ms. Montez on Monday, January 29, 1996, and reject the testimony that she again presented her previously rejected expired/extended Form I-94 card on that date, instead.

OSC's evidence concerning the events occurring on Monday, January 29, 1996 constitute prima facie evidence of two document abuse violations, neither of which has been rebutted by Acosta's evidence. More specifically, it is found that respondent wrongly refused to honor legally

sufficient documents which Ms. Lopez had tendered on that date and which reasonably appeared to have been genuine. It is also found that Acosta continued to violate the document abuse provisions in another respect on that date, i.e. by having continued to demand that Ms. Lopez furnish an additional or different document than required for Form I-9 purposes namely, the written INS receipt for the Form I-765.

It is to be noted that even in the event that respondent had effectively demonstrated by the required quantum of rebuttal evidence that Ms. Lopez had not presented her Social Security card on Wednesday, January 24, 1996, on Thursday, January 25, 1996, or on Monday, January 29, 1996, this evidentiary record clearly discloses that Acosta nonetheless violated the document abuse strictures of IRCA in three respects on Thursday, January 25, 1996, and on Monday, January 29, 1996. The respondent failed to accept a valid List A document, the extended Form I-94, which established Ms. Lopez's identity and employment eligibility on the earlier date, and the newly-issued Form I-94, which served the same purpose on the latter date. In addition, the third violation occurred as a result of Mr. Acosta's seemingly unremitting request of Ms. Lopez that she obtain the written INS receipt for the Form I-765.

The next issue to be addressed is the appropriate civil penalty to be assessed for the proven document abuse practices involving Ms. Lopez. As noted previously, the civil penalty range for these 8 U.S.C. § 1324b(a)(6) violations is an assessment of not less than \$100 and not more than \$1,000 for each individual discriminated against in that manner.

OSC has previously assessed a civil penalty of \$1,000. In the absence of any evidence that OSC acted unreasonably in having decided upon that recommended civil penalty sum, or that OSC has in some manner abused its assessment discretion in having done so, I find that a civil penalty of \$1,000 is in order under these facts.

The final issue to be ruled upon involves the back pay claim of Ms. Lopez, based upon those IRCA provisions set forth at 8 U.S.C. § 1324b(g)(2)(B)(iii). In requesting back pay for Ms. Lopez, OSC urges that upon a showing of liability, as here, the injured party is presumptively entitled to back pay. Marcel Watch, 1 OCAHO 143, at 56-58 (March 22, 1990). Other supportive rulings include Albemarle Paper Co. V. Moody, 422 U.S. 405, 421 (1975). See also Louis Padnos, at 12; United States v. Southwest Marine Corp., 3 OCAHO 429, at 36 (May 12, 1992); Jones v. DeWitt Nursing Home, 1 OCAHO 189, at 21 (June 29, 1990).

I find that Ms. Lopez is entitled to back pay beginning on Thursday, January 25, 1996, the date upon which she would have begun working at the respondent's McDonald's at the hourly wage rate of \$4.50, following her having provided to Acosta satisfactory identity and employment eligibility documents at the orientation on the late afternoon of the previous day.

The back pay period of entitlement ended on Tuesday, February 13, 1996, or the day prior to Ms. Lopez having begun work at another unrelated McDonald's in San Antonio. The back pay period, therefore, is 20 days, or some three weeks as a practical matter, at 33 hours weekly, or \$148.50 for each of the three weeks, or back pay totalling \$445.50 for that period.

Ms. Lopez is also entitled to interest on that sum, beginning on February 13, 1996 through August 28, 1997, the date of this Decision and Order, at the rate of nine percent, the short-term rate for underpayment of taxes assessed by the Internal Revenue Service during that 562-day period, or \$61.73. Accordingly, Ms. Lopez is entitled to the back pay and interest in the total sum of \$507.23.

Order

Having found that respondent violated the document abuse provisions of 8 U.S.C. § 1324b(a)(6) by having failed to honor valid documents tendered that on their face reasonably appeared genuine, as well as having requested more or different documents than required for employment verification purposes by the provisions of 8 U.S.C. § 1324a(b), it is hereby ordered that respondent cease and desist from such unfair immigration-related employment practice.

It is further ordered that respondent pay the sum of \$1,000 as the appropriate civil penalty for those violations.

It is also ordered that respondent pay to Ms. Lourdes Gonzalez Lopez the total sum of \$507.23, which represents the sum of \$445.50 in back pay, plus interest in the amount of \$61.73, computed at the rate of nine percent for the 562-day period beginning on Thursday, January 25, 1996, to the date of this Decision and Order.

Joseph E. McGuire
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 1997, I have served copies of the foregoing Decision and Order to the following persons at the addresses shown, in the manner indicated:

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